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Structural Tax Exceptionalism

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> "The report of my illness grew out of his illness. The report of my death was an exaggeration."[1]
>
> —Mark Twain

I. INTRODUCTION

In its 2011 decision in *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court announced that it was "not inclined to carve out an approach to administrative review good for tax law only."[2] Following *Mayo*, it has come into vogue among scholars of tax law to declare the death of tax exceptionalism.[3] Like the reports of Mark Twain's death, these pronouncements are exaggerations.[4] The *Mayo* Court itself

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[1] *See* TWAINQUOTES.COM, http://www.twainquotes.com/Death.html (last visited Feb. 15, 2015) (displaying an image of a note written by Mark Twain). Somewhat ironically, this quotation has often been misreported as "Reports [or rumors] of my death have been greatly exaggerated." *See, e.g.*, Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1153 n.55 (2006) (documenting the common confusion); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1161 n.29 (2000) (noting and correcting the quoted error).

[2] 562 U.S. 44, 55 (2011).

[3] *See, e.g.*, Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013) ("[T]he Supreme Court rejected tax exceptionalism . . . ."); Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 279 (2012) (noting that "the *Mayo* Court disposed of tax exceptionalism," while cautioning that "[p]recisely how far we can go in this direction remains to be seen" due to the "revenue imperative"); Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 696–98 (2012) (proposing to consider facts surrounding issuance of rule under applicable deference standard and noting that the *Mayo* Court was "loath" to create an exception for tax cases); Shannon Weeks McCormack, *Tax Abuse According to Whom?*, 15 FLA. TAX REV. 1, 5–7 (2013) (examining how much deference should be given to IRS's and Treasury's decision to issue retroactive rules to combat abuse); James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 366–74 (2013) (arguing that the Code's rulemaking provisions significantly modify APA procedures); Andre L. Smith, *The Nondelegation Doctrine and the Federal Income Tax: May Congress Grant the President the Authority to Set the Income Tax Rates?*, 31 VA. TAX REV. 763, 778 (2012) ("The current trend, however, is towards rejecting so-called tax exceptionalism."); Roger Dorsey, Mayo *and the End of 'Tax Exceptionalism' in Judicial Deference*, 87 PRAC. TAX STRATEGIES 63, 68 (2011) ("The era of tax exceptionalism in judicial deference is over.").

[4] Others have recently pushed back, explicitly or implicitly, against the idea that tax exceptionalism is dead. However, they have focused on rulemaking or adjudication rather than the broader structure of tax administration. Bryan Camp has argued that the pre-APA history of tax rulemaking should inform our application of the legislative versus interpretative rule divide. *See* Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1714–15 (2014) ("Those who write in this area must not fall into the presentist fallacy of assuming that the terms of the APA contain

explicitly hedged its generalization about a uniform approach to judicial review, leaving a foothold for those who argue that "justification" exists for applying different approaches to judicial review of tax administration.[5] In many circumstances, such a justification exists in the structure of tax administration under the Internal Revenue Code (Code or I.R.C.),[6] which differs from the template set forth in the Administrative Procedure Act (APA).[7] Accordingly, tax exceptionalism seems likely to remain alive and well, even if it may nominally constitute a residual phenomenon rather than a guiding principle.

The acceptations of "tax exceptionalism" are diverse; this Article addresses "the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax."[8] The idea of tax exceptionalism, and criticisms of it, are not new.[9] Courts seemed

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meaning independent of history and of the administrative context to which they are applied."). Richard Murphy has suggested that the flexibility of general administrative law concepts, such as interpretative versus legislative, could leave courts room to find tax regulations interpretative. *See* Richard Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 DUKE L.J. ONLINE 21, 24 (2014). Steve Johnson has proposed a nuanced approach to the reasoned explanation requirement, based in part on prudential considerations, with respect to IRS adjudication. *See* Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1773–77 (2014).

[5] *See Mayo*, 562 U.S. at 55 ("Mayo has not advanced any justification for applying a less deferential standard of review . . . . In the absence of such justification, we are not inclined to carve out an approach . . . good for tax law only.").

[6] Title 26 of the United States Code.

[7] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[8] Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1901 (2014). The compelling government interest in revenue collection is often proffered as a justification for treating tax as special. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1720 (2014). Professor Hickman has estimated that "a lot—maybe even a majority—of the effort that Treasury and the IRS spend promulgating regulations concerns . . . functions other than raising revenue." *Id.* at 1723. Accordingly, Hickman has proposed reconsideration of certain statutory exceptions from APA requirements. *Id.* These arguably "nontax programs" may well merit special analysis, which lies beyond the scope of this Article. *Cf. id.* at 1761 (calling for Congress and the courts to "contemplate more seriously the potential administrative-law implications of situating nontax programs" in the Code).

[9] One of the best known works criticizing tax exceptionalism recommended more borrowing between tax and non-tax areas of law, a relationship which could be mutually beneficial. *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 531–32 (1994) (criticizing the isolation of tax from non-

to embrace tax exceptionalism by citing tax-specific precedents with different standards when reviewing interpretations of law adopted by the IRS and Treasury, rather than merging tax jurisprudence with authorities that apply to non-tax judicial review.[10] It has only been since 2011 with *Mayo* that the tax bar has seen a rejection, in at least a general way, of tax exceptionalism by the Supreme Court. Unsurprisingly, the precise ramifications of *Mayo* on the tax administration have not yet been sorted out.

A plausible overall account of tax administration must address rulemaking procedures. Although solicitation of pre-promulgation public comments on proposed regulations—as occurred with the regulations at issue in *Mayo*—is standard operating procedure,[11] the greater context of tax guidance is not so simple. The IRS and Treasury sometimes have not undertaken APA-style notice and comment rulemaking.[12] In certain scenarios, the IRS and Treasury have published final regulations or other published guidance without first (or, perhaps, ever) soliciting public

tax jurisprudence and the resulting justification of different methods of statutory interpretation for tax versus non-tax areas of law). Professor Hickman later critiqued tax exceptionalism in the context of judicial deference to Treasury regulations and Treasury's failure to undertake notice-and-comment procedures when required. *See generally* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) [hereinafter Hickman, *The Need for* Mead] (arguing that the *Chevron/Mead* framework should apply to Treasury regulations); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (studying the Treasury's failure to comply with the APA-required pattern).

[10] *See Mayo*, 562 U.S. at 54 ("Although we have not thus far distinguished between *National* Muffler and *Chevron*, they call for different analyses of an ambiguous statute.").

[11] *See* INTERNAL REVENUE MANUAL § 32.1.5.4.7.5.1(3), *available at* http://www.irs.gov/irm/part32/irm_32-001-005.html#d0e347 ("Although most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA, the Service usually solicits public comment when it promulgates a rule.").

[12] *See infra* Part III.A.*2*. Under the APA, a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2012). An adjudication, on the other hand, is the process for "the formulation of an order." *Id.* § 551(7). An "order" is "the whole or a part of a final disposition . . . in a matter other than rule making." *Id.* § 551(6). Adjudication is thus a residual category where an action does not constitute rulemaking.

comments.[13] In other situations, the IRS and Treasury have issued immediately effective temporary regulations with comments to follow, before finalizing regulations.[14] The IRS and Treasury sometimes issue rules designed to affect pending litigation, and occasionally issue rules with retroactive effect.[15] The IRS has claimed that most tax regulations are interpretative and accordingly exempt from APA notice and comment rulemaking procedures.[16] Indeed, even post-*Mayo*, the IRS continues to assume that most tax regulations will qualify as interpretative.[17] Moreover, the IRS issues a substantial amount of subregulatory guidance without soliciting comments from the public.[18] Taxpayers are generally subject to penalties for negligence or disregard of regulations and other published subregulatory guidance.[19]

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[13] *See* Hickman, *Coloring Outside the Lines*, *supra* note 9, at 1736–37 (noting that the Treasury maintains that "most" of its regulations are "interpretative" and do not require notice-and-comment).

[14] *See id.* at 1748–49 (finding that the Treasury issued legally-binding temporary regulations simultaneously with a notice of proposed rulemaking for 36.2% of projects from 2003–05).

[15] In a post-*Mayo* tax controversy, the Supreme Court had an opportunity to provide guidance with respect to questions surrounding litigation oriented and retroactive tax regulations, but did not address such issues because it found the statute unambiguous. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842–44 (2012); Puckett, *supra* note 3, at 372 (noting that after *Home Concrete*, "it remains unclear what the Court thinks about validity of and deference applicable to temporary regulations in general, or retroactive temporary regulations in particular").

[16] *See* Hickman, *Coloring Outside the Lines*, *supra* note 9, at 1729; *see also* 5 U.S.C. § 553(b)(3)(A) (exempting interpretative rules from informal rulemaking procedures).

[17] INTERNAL REVENUE MANUAL, *supra* note 11, § 32.1.5.4.7.5.1(2). The IRS's logic tracks the leading distinction in case law that there is a continuum between new rules and interpretations of law:

> [M]ost IRS/Treasury regulations will be interpretative regulations because they fill gaps in legislation or have a prior existence in the law . . . [and] the underlying Internal Revenue Code section imposing the tax or providing for collection of a tax will provide an adequate legislative basis for the action in the regulations.

Id.

[18] *See* Hickman, *Coloring Outside the Lines*, *supra* note 9, at 1804 (describing methods used by the IRS to give taxpayers guidance, other than regulation).

[19] *See* I.R.C. § 6662(b) (2012) (listing categories of underpayments of tax that are subject to penalties); *see also* Hickman, *The Need for* Mead, *supra* note 9, at 1605 (noting that Congress used the same "rules and regulations" terminology in section 6662 (imposing penalties) as in section 7805 (granting authority to the IRS and Treasury to issue guidance)).

Mayo provides a general principle but its precise holding is that a notice and comment tax regulation should be analyzed under the familiar two-step *Chevron*[20] framework rather than the less deferential multifactor *National Muffler*[21] tax decision.[22] Accordingly, questions remain as to what tax rules qualify as "interpretative," the validity of temporary tax regulations, and what deference courts should apply when reviewing tax rules, whether regulations or subregulatory guidance, that were issued without following the APA's notice and comment procedures.

To think critically about the implications of *Mayo* for tax, one must take a step back from tax administration and think about non-tax administrative law. A typical administrative agency combines prospective rulemaking, enforcement, and retroactive adjudicatory powers under one umbrella.[23] This structure presents a potential for an agency to overreach or abuse power. Ordinarily, however, without specific evidence of actual bias, no serious constitutional issue arises:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a

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[20] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[21] Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979).

[22] *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011) ("*Chevron* . . . rather than *National Muffler* . . . provide[s] the appropriate framework for evaluating the full-time employee rule.").

[23] *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." (exemplifying with the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission)); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 638 (1996) (noting that the "typical administrative agency has power not only to adopt 'legislative' rules, but also to enforce those rules and to adjudicate cases arising under them"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 808–09 (2013) (showing that a survey of agencies "confirms an assertion fairly common in the literature that the authority to proceed through adjudication is common and not limited to agencies with statutory removal protection").

> realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[24]

Thus, administrative agencies routinely promulgate rules, bring suit to enforce those rules, and adjudicate controversies.[25] Moreover, recent research has persuasively challenged a commonly held understanding that the modern administrative state represents a fall from grace tolerable only because of necessity and changed circumstances.[26]

Tax administration, however, is anything but typical. Indeed, it contrasts starkly with the APA, including both seemingly pro-taxpayer and anti-taxpayer departures from the APA template.[27] A potentially powerful protection for taxpayers is the vesting of formal adjudicatory powers primarily in the courts rather than the IRS.[28] This protection stacks up against several taxpayer-resistant structural features.

The Code permits tax rules to take effect retroactively;[29] in contrast, the Supreme Court has construed the APA to generally prohibit agencies from issuing rules with a retroactive effective date.[30] Although a retroactive rule does not quite find facts in a controversy, it can have quasi-adjudicatory effects by prescribing

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[24] Withrow v. Larkin, 421 U.S. 35, 47 (1975).

[25] Formal adjudication is subject to various procedural safeguards in the APA, limiting, among other things, ex parte contact, providing for independence of the presiding officer, and requiring decisions to be based on the record. Administrative Procedure Act, 5 U.S.C. §§ 554(d), 556(b), (d) (2012).

[26] *See infra* Part II.A.

[27] *See infra* Part III.

[28] This unduly simplifies the labyrinthine tax litigation process. For a more thorough description, see Part III.B.

[29] I.R.C. § 7805(b) (2012).

[30] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). In *Bowen*, the Court explained, "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* Moreover, "[b]y the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.*

rules of decision with the benefit of hindsight. Moreover, subject to very narrow exceptions, the Code and the Declaratory Judgment Act generally compel taxpayers to challenge Treasury Regulations only post-enforcement.[31] Accordingly, unlike most regulated parties, taxpayers cannot generally vet their position in court without risking additional tax liability and may view procedural resistance as futile.[32] In sum, the structure of tax rulemaking makes it far more difficult to defuse tax collection through procedural challenges, but the Code denies the IRS the ability to find the facts and set the record in the first instance.[33]

Because the Code supplants the APA in these important ways, the death knells for tax exceptionalism should be quite muffled. Yet the literature has failed adequately to focus on how the overall structure of tax administration, rulemaking, and adjudication articulate together and could possibly account for one another.[34] A more balanced treatment shows that the structure as a whole promotes equal treatment of similar taxpayers, affords taxpayers an opportunity for individualized justice, and promotes the production of guidance for taxpayers. To be sure, there are alternatives; however, this Article insists that other administrative structures would entail a mix of gains and losses compared to the status quo.

This Article argues that it is misleading to declare the death of tax exceptionalism and that structural tax exceptionalism may have important benefits. Part II provides a brief historical overview of the rise of federal agency administration of statutes and especially tax laws. The history tends to detract from anti-tax and anti-

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[31] *See* I.R.C. § 7421 (2012); 28 U.S.C. § 2201 (2012).

[32] *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1193 (2008) (positing that "taxpayers may perceive that challenging temporary Treasury regulations on APA procedural grounds is a futile act not worth the effort").

[33] This tendency toward court adjudication rather than administrative adjudication may increase the overall costs of adjudicating tax controversies without providing offsetting benefits. *See* Mirit Eyal-Cohen, *Preventive Tax Policy: Chief Justice Roger J. Traynor's Tax Philosophy*, 22–25 (UCLA Sch. of Law & Legal Theory Research Paper Series, Research Paper No. 07-27, 2007), *available at* http://ssrn.com/abstract=1010484 (describing Justice Traynor and Stanley S. Surrey's proposal to increase inexpensive administrative solutions to tax disputes).

[34] *See, e.g.*, Hickman, *supra* note 3, at 470 ("I limit my analysis of the relationship between *Chevron* deference and the force of law to the rulemaking sphere and defer considering agency adjudication.").

agency rhetoric that counsel disempowering the Treasury Department and other administrative agencies from comprehensively enforcing laws and making policy in their relevant domains. Moreover, structural tax exceptionalism may be explained in part as an accident of its earlier roots and the unique historical development of the tax administration compared to administrative agencies in general.[35] Part III analyzes how the Code's structure for tax administration differs from the APA template for administrative agencies. Some of the most important differences include an arguably pro-taxpayer, court-centered adjudication pathway;[36] meanwhile, the IRS and Treasury are vested with greater flexibility in promulgating guidance than the typical administrative agency, and judicial interference with tax administration is quite limited until attempted collection.[37] Part IV deconstructs these differences, drawing from general administrative law scholarship to identify potential advantages and drawbacks of structural tax exceptionalism. This Article concludes by recommending caution before dismantling the exceptional features of tax administration. It is undeniable that the current tax system is imperfect, but it is unclear that turning the structure of tax administration on its head—and thereby taking on the problems of a typical administrative agency—will improve tax administration.

II. HISTORICAL OVERVIEW OF FEDERAL ADMINISTRATIVE AGENCIES

This Part summarizes the rise of federal agency administration, including tax collection. This discussion serves two purposes. First, situating tax administration in historical context anticipates a fundamental question that some inside the tax community would naturally ask: Whether today's administrative landscape is radically different and unrecognizable from that of the Framers and accordingly illegitimate. Though it has been developed elsewhere in both general administrative law scholarship and in tax scholarship, this history is not well known in the tax bar, and some reflexive hostility to *Chevron* and *Mayo* likely derive from mistaken

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[35] *See infra* Part II.B–C.
[36] *See infra* Part III.B.*3*.
[37] *See infra* Part III.A.*2*–*3*.

assumptions about the history.[38] Second, the historical background helps to explain the unusual structure of tax administration today; deeper roots and distinctive problems arguably have led to an exceptional structure of tax administration.

A. THE RISE OF ADMINISTRATIVE AGENCIES

Even with the APA as a "bill of rights for the new regulatory state,"[39] legal scholars have raised serious criticisms of the constitutionality of the modern administrative state.[40] Broadly conceived, the APA provides the public with procedural rights, input into the regulatory process, and ensures that a record exists for adequate judicial review. Nevertheless, critics such as Gary Lawson have decried the "bloodless constitutional revolution"[41]:

> The constitutional separation of powers is a means to safeguard the liberty of the people. In Madison's famous words, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.[42]

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[38] *See* Hickman, *supra* note 3, at 532 ("Tax practitioners are already dismayed by the power they perceive the *Mayo* decision has given to Treasury to dictate legal outcomes.").

[39] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996).

[40] *See infra* notes 41–44 and accompanying text.

[41] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

[42] *Id.* at 1248 (footnotes omitted). Approving of New Deal criticism, Cass Sunstein similarly observed that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987).

As John McGinnis explains, "over time, special interests have urged Congress to grant broad delegations of legislative power to agencies whose rulemaking processes can be captured more readily than the complicated and burdensome legislative process."[43] According to this fall from grace narrative, "The rise of the modern administrative state has created the possibility of massive substitution of administrative discretion for the original restraints of bicameralism and presentment."[44] This critique need not be repeated here at length.

Such longstanding originalist critiques of administrative tyranny and illegitimacy have suffered an impactful blow in Jerry Mashaw's historical analysis of the rise of the administrative state.[45] Professor Mashaw examines the understudied first hundred years of federal administration, including tax collection and other government functions.[46] Mashaw uncovers a decidedly pragmatic bent to federal administration of tax and other law:

> There simply never was a time in which federal public law was self-executing, fully specified by Congress, and enforced through judicial decree. Nor was there a time when administrative officials were directly under the control of the President and subject to his direction in all matters great or small. To the extent that we model our contemporary jurisprudence on the idea that the administrative state is sad evidence of the decline of American democracy and the rule of law, we imagine a non-administrative state that never was. . . . The American administrative constitution has been a continuous experiment in institutional design that has sought, through a host of differing techniques, to

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[43] John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 916 (2001) (arguing that the expansion of agency discretion offers an opportunity to circumvent bicameralism and presentment).

[44] *See id.* at 917 (noting that agency heads, not the President, issue most regulations under authority from Congress).

[45] *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (dispelling the "myths" that led to these critiques).

[46] *Id.* at 5, 17–25, 34–37.

> accommodate administrative efficacy to multiple conceptions of democracy and the rule of law.[47]

Accordingly, to the extent that proponents of administrative flexibility have conceded on history and justified modern agencies on grounds of necessity, they appear to have conceded too much. As Mashaw writes, "We tell ourselves stories about the modern administrative state that unduly delegitimate its constitutional status and mislead us to some degree about the sources of administrative law that might provide the building blocks for effective reforms."[48]

Mashaw synthesizes several "patterns of pragmatism" in the early history of the United States that are contrary to the narrative that modern administrative governance constitutes a departure in kind from the practices of the earliest Congresses.[49] First, administration was not always "lodged in departments and accountable directly and exclusively to the President."[50] Second, though Congress sometimes "micromanaged administration,"[51] delegation was more common; indeed, "many early statutes not only required public administration, they were almost devoid of policy direction."[52] This left to administrative officials the space to govern through "general rules and by the adjudication of countless claims and disputes."[53]

Notwithstanding the relative specificity of early revenue laws, customs administration illustrates the practical limits of statutory

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[47] *Id.* at 312.

[48] *Id.* at 286; s*ee also id.* at 288 & 409 n.8 ("By the end of the Second World War America had created a large administrative state that was believed by some, particularly leaders of the American Bar Association, to be lurching toward tyranny. . . . Similarly, agencies' combination of legislative, executive, and judicial functions struck many as dangerously aggrandizing executive power and creating the potential for bias and prejudgment in administrative determinations.").

[49] "Commentators relentlessly bemoan the loss of political or popular control over administration that they associate with the Republic's first hundred years." *Id.* at 50, 308.

[50] *Id.* at 50–51.

[51] *Id.* at 44. As an example of micromanagement, Congress enacted a "detailed and complex" excise tax collection system with respect to distilled spirits in 1791. *Id.* at 37. The statute "occupies fifteen pages in the *Statutes at Large* and specifies everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used . . . to identify revenue offices." *Id.* at 44.

[52] *Id.* at 51.

[53] *Id.*

specificity—even in a tax system that was much simpler than the current regime:

> Statutes could specify the level of the tax and on what it should be levied. But when objective tests, such as proof measured by a specific type of hydrometer, were not feasible, judgment by revenue officers was inevitable concerning the nature or grade of the articles taxed and their value. Administrative discretion was also required precisely to avoid the injustice of rigid application of highly specific statutory requirements. Tax collectors, for example, were given the power to excuse offenses when there had been "substantial compliance" or no "intent to defraud," or when a violation was caused by unavoidable circumstances.[54]

Thus, the administration of customs duties belies the notion that "early congressional practice establishes a narrow view of what could constitutionally be delegated to administrative officials."[55] Ironically enough, tax administration seems to have been from the beginning both exceptional and unexceptional: vast discretion turned out to be inherent even in a highly specified system.

Importantly, "the specificity of revenue and postal statutes was in many ways exceptional."[56] But even then, as noted above, delegation, discretion, and pragmatic function took hold, and not just in tax administration. As a non-tax example, the postal service is instructive in largely the same way as customs. Pro-delegation and anti-delegation factions in Congress quarreled over the specificity of the design of the postal service, and the anti-delegation faction declared a limited victory with careful specification of stations and rates.[57] Nevertheless, the Postmaster General garnered substantial discretion to create additional post roads, enter into contracts for mail carriage, and regulate the acts of subordinates.[58] Mashaw also notes that the three-member

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[54] *Id.* at 45.
[55] *Id.*
[56] *Id.* at 46.
[57] *Id.*
[58] *Id.*

Patent Office was perhaps the first independent commission, consisting of the Attorney General, Secretary of State, and Secretary of War; this "board of eminent political appointees" exercised quasi-judicial powers.[59]

Much of the foregoing structural analysis would not necessarily shock or alter the conclusions of a pragmatic or functionalist defender of the modern administrative state.[60] But Mashaw's work suggests that pragmatists should be less apologetic, and originalists should be less hostile to the delegation and deference trends with respect to modern agencies.

Mashaw's work also reaffirms that the scope of judicial review of agency action has become broader, while standards of review have often become more deferential. Acknowledging that judicial review was indeed very different, Mashaw takes issue with Frederic Lee's critique[61] of the effectiveness of early judicial review of administrative action.[62] A full menu of common law forms of action was available to contest much administrative action.[63] Unlike today's administrative practice—where lawsuits target the government and injunctive and declaratory relief are the norm—administrative challenges in the eighteenth and nineteenth centuries were against the administrator in his personal capacity, and damages were the norm.[64] Meanwhile, courts restricted mandamus relief to non-discretionary matters in a very strict

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[59] *Id.* at 50.

[60] *See* Sunstein, *supra* note 42, at 451 ("The goals of limited government and stability, originally of considerable importance to the distribution of national powers, provide the least compelling justification for a return to the original constitutional framework. The reasons are both practical and conceptual.").

[61] *See* Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 291 (1948) (asking rhetorically: "The right to collateral review through the relatively unimportant common law remedies, such as trover, detinue, assumpsit, and replevin, against executive officers who had acted in excess of their jurisdiction, was not questioned. But could their actions be directly reviewed by the courts through mandamus, injunction or appeal?").

[62] *See* MASHAW, *supra* note 45, at 76 ("To take the breadth issue first, is Frederic Lee correct that the common law remedies left too much official action outside the scope of effective judicial review? As to the Federalist period, my hesitant conclusion is 'not really.' "); *see also id.* at 308 ("And, they by and large view judicial review as nonexistent until the early twentieth century.").

[63] *See id.* at 76 ("A host of standard common law actions . . . were available to test the legality of these official actions.").

[64] *See id.* at 75–76.

sense;[65] accordingly, policy review such as we have internalized today was virtually non-existent.[66]

Courts generally reviewed administrative action on a de novo basis, provided that the plaintiff could state a common law claim against an administrator.[67] To be sure, there were some exceptional categories where no common law action would lie,[68] and in exceptional cases such as land patents courts applied a "res judicata" model allowing for very little substantive review,[69] but generally the prospect of defending a lawsuit constrained administrative action.[70]

In the tax context, the structure and incentives were again somewhat exceptional. Customs agents and other tax enforcement agents, like many other administrative agents at the time, worked in part on commission.[71] Though collectors potentially faced common law claims in state court, they were shielded by an unusual statutory defense of reasonable cause, and could recoup doubled legal fees from unsuccessful plaintiffs.[72] On the other hand, fact finding would take place before a potentially hostile state court or jury.[73] The possibility of a suit in an unfriendly state court could be debilitating to collection efforts.[74] Though it is unclear how well the protective features worked, in a back of the envelope manner the incentives could be seen as roughly balanced between deterring administrative corruption and tax evasion.[75]

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[65] *Id.* at 302.

[66] *See id.* at 308 (observing that "the willingness of modern courts, at the behest of modern Congresses, to insert themselves into the policy processes of administrative decision making represents the most substantial change in our administrative constitution over these 200-plus years").

[67] *See id.* at 302 ("[T]o the extent that courts were presented with common law actions against federal officers, they exercised de novo review.").

[68] *See id.* at 77 (noting that while denial of a ship license or passport might not be reviewable, the area was "noncontentious").

[69] *Id.*

[70] *Id.* at 136–43.

[71] *Id.* at 61; *see also* NICHOLAS R. PARILLO, AGAINST THE PROFIT MOTIVE, THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 192–94 (2013).

[72] MASHAW, *supra* note 45, at 73.

[73] *Id.* at 71–73.

[74] *See id.* (describing a case of state court tax nullification). As Mashaw puts it, "Judicial review in a de novo form could be enormously intrusive, indeed paralyzing, at the hands of nineteenth-century courts and juries." *Id.* at 308.

[75] *See id.* at 73.

The standard narrative roots administrative agencies in the Interstate Commerce Commission (ICC)[76] created in 1887.[77] As Mashaw has documented, an explosion of administrative activity began somewhat earlier, with Congress granting "virtual carte blanche" to agencies with respect to quarantines, steamboat regulation, and pre-ICC railroad regulation.[78] Substantial growth (for example, the Federal Trade Commission) of federal agencies continued into the early twentieth century even with conservatives in power.[79] The Great Depression spurred the creation of administrative agencies.[80] Under Roosevelt, "[a]n avalanche of new federal agencies and commissions — including the National Recovery Administration, the NLRB, and the SEC — reached ever more broadly into a free market that appeared to have failed."[81]

In the early twentieth century, judicial review also took first steps toward a system recognizably like our modern system. In particular, "mandamus jurisprudence nevertheless reflected movement toward reconceptualizing direct judicial review as a public action designed to control official behavior rather than as a private lawsuit between individuals, one of whom happened to occupy a public office."[82] However, change toward a public action was "incremental and began inauspiciously."[83]

According to Louis Jaffe's account,[84] the Supreme Court crafted a presumption of reviewability for administrative action in the 1902 case *American School of Magnetic Healing v. McAnnulty*.[85] Despite the long history of a bimodal (all or nothing) judicial review model, the Court concluded that the "acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have

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[76] *See, e.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189–90 (1986).

[77] MASHAW, *supra* note 45, at 4 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985)).

[78] *Id.* at 240–44.

[79] *See* Shepherd, *supra* note 39, at 1561–62.

[80] *Id.* at 1561.

[81] *Id.* at 1562.

[82] MASHAW, *supra* note 45, at 245.

[83] *Id.*

[84] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 327–53 (1965).

[85] 187 U.S. 94 (1902); JAFFE, *supra* note 84, at 339.

jurisdiction to grant relief."[86] From this precedent, judicial review gradually evolved to a more recognizable state.[87]

It would take numerous failed attempts at legislation dating from 1929 before Congress and President Truman enacted the APA.[88] Conservatives and liberals had vastly different views of how much control to impose on agencies.[89] Court challenges to administrative schemes met with some success, but ultimately the Supreme Court witnessed the famous "switch in time that saved nine."[90] Finally, in 1946, the APA was signed into law; it has been "profound and durable" yet leaves many unanswered questions because legislators could only agree on intentionally ambiguous language with respect to fundamental principles (e.g., legislative versus interpretative rules), the meaning of which would ultimately be resolved by courts.[91] Part III begins with a brief overview of those concepts.

B. DEVELOPMENT OF FEDERAL TAX ADMINISTRATION

As mentioned in Part II.A, from the eighteenth century until the early twentieth century, the government raised revenue primarily from customs supplemented with internal excise taxes.[92] The predecessor to the modern income tax was a modest and temporary income tax (along with an inheritance tax) enacted to

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[86] *Am. Sch. of Magnetic Healing*, 187 U.S. at 108.

[87] *See* JAFFE, *supra* note 84, at 120–51 (detailing the evolution of the Court's primary jurisdiction to review agency decisions); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 408 (2007) (noting that courts began to defer to agency determinations in subject matters clearly within traditional notions of the police power, but scrutinized agency determinations at the outer edge of the police power more closely).

[88] *See generally* Shepherd, *supra* note 39 (detailing several failed bills leading up to the eventual compromise of the APA).

[89] *See* Schiller, *supra* note 87, at 423–25 (discussing conservative support for "adequate checks upon administrative action" that would have resulted from the failed Walter-Logan Bill).

[90] *See* Shepherd, *supra* note 39, at 1562–63 (discussing Justice Roberts's switch to ultimately supporting New Deal programs and agencies).

[91] *See id.* at 1662–66, 1678–83 (describing the ambiguous "compromise" and "scramble" of both sides to create legislative history to support their desired interpretation).

[92] *See infra* Part II.B; *supra* Part II.A (discussing the early administration of customs); *see also* Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1091–92 (2001) (arguing that income tax arose in response to the inadequacy and unfairness of early consumption taxes).

help finance the Civil War, first in 1861 and amended in 1862.[93] "From a revenue perspective, the income tax was less important than the comprehensive system of excise taxes included in the 1862 act, as well as its inheritance tax and levies on a wide range of business activities."[94]

The 1862 Act established the Office of Commissioner and the Bureau of Internal Revenue within the Treasury Department.[95] The Bureau administered remaining internal revenue taxes even after the repeal of the Civil War income tax.[96] The Bureau initially operated through 185 geographical districts, each with a presidentially appointed assessor and collector.[97] A large group of unappointed subordinates quickly were hired.[98] The Civil War income tax left many concepts vague; accordingly, the Commissioner had responsibility for implementing regulations as well as enforcing the law.[99]

Although collections could be described as a success, it is not entirely surprising that the first attempt at implementation of a federal income tax was antagonistic:

> But all was not well in the Bureau. The collection system was inherently adversarial, prompting considerable tension between officials and taxpayers. The sweeping powers that devolved upon field staff, especially assistant assessors, exacerbated this problem. Both outside critics and agency officials complained that poorly trained and inadequately compensated personnel had hobbled the agency.[100]

In short, the administration of the tax was "inquisitorial," something tolerable in a time of crisis but less tolerable in normal times.[101] Another feature contributing to the tax's unpopularity

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[93] *See* Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 719–22 (2001) (discussing the 1861 and 1862 income taxes).

[94] *Id.* at 722.

[95] *Id.* at 723.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 724 & n.19.

[99] *Id.* at 724.

[100] *Id.* at 725–26.

[101] *Id.* at 726–27.

was publicity of tax returns.[102] Although publicity would seem to be an excellent way of enforcing compliance by indirectly involving neighbors, resentment against the practice led to its later reversal by Congress in 1870.[103] Finally, the low pay rate for Bureau employees contributed to serious problems of staff turnover, incompetence, and corruption.[104]

Despite an inquiry from a special commission on the topic of tax administration and law, only modest staffing changes were made in 1866.[105] The Civil War income tax eventually expired after 1871, but the Bureau remained in largely the same form to administer remaining internal excise taxes, which would—along with customs duties—provide the bulk of federal revenue until World War I.[106] After an 1894 attempt to tax income, which was rejected by the Supreme Court as an unconstitutional direct tax lacking apportionment,[107] the next federal income tax was enacted in 1913 after the ratification of the Sixteenth Amendment.[108] With astronomical growth in revenue came problems of delayed processing of returns and appeals, along with familiar allegations of corruption and favoritism.[109]

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[102] *Id.* at 727.

[103] *Id.* at 727–28.

[104] *See id.* at 728 (discussing the problems caused by Bureau employees' low pay). Frederic Howe, writing in the late nineteenth century, explained the hostile reception to the Civil War experiment with an income tax:

> The income tax has always been unpopular with certain classes. It is indicted as invading the sanctity of the most private affairs, as being inseparable from inquisitorial scrutiny into business relations, and an insufferable intrusion into those affairs of the individual which are in a sense sacred, and which in the past had been exempted from the visits of the tax-gatherer. It is further alleged that a tax which offers such opportunities for evasion is a charge upon honesty and patriotism, and a premium upon perjury.

FREDERIC C. HOWE, TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM 1791–1895: AN HISTORICAL SKETCH OF THE ORGANIZATION, DEVELOPMENT, AND LATER MODIFICATION OF DIRECT AND EXCISE TAXATION UNDER THE CONSTITUTION 95–96 (1896).

[105] *See* Thorndike, *supra* note 93, at 733 (explaining that the principal change in the Bureau's organization was "more adequate" staffing).

[106] *Id.* at 734.

[107] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 583–86 (1895), *modified on reh'g*, 158 U.S. 601, 637 (1895).

[108] Thorndike, *supra* note 93, at 740.

[109] *See id.* at 743–50 (discussing the inefficiencies and resulting criticisms of the Bureau during and after World War I).

One criticism of the Bureau that may partially explain the unusual features of modern tax rulemaking[110] was that the lack of tax guidance led to unfairness, personnel turnover, favoritism, and corruption.[111] A special commission found a direct connection between secrecy and tax inequity:

> Indeed, secrecy was as a recurring complaint in the committee's report. The panel pointed out that Bureau personnel and taxpayers confronted a dearth of published guidance and regulations. "This failure to promulgate and publish the principles and practices to be followed in determining tax liability has resulted in gross discrimination between taxpayers similarly situated[,]" the report stated.[112]

Moreover, the lack of guidance not only led to inequity between similarly situated taxpayers; it also amplified the revolving door effect, whereby insiders with valuable knowledge would leave for lucrative private employment, while the Bureau would be left with inadequate, poorly trained personnel.[113]

Even after another special commission investigated these problems, and bitter frictions between Congress and Secretary of the Treasury Andrew Mellon surfaced, Congress failed to enact any fundamental reforms.[114] More sweeping reform would not take place until the 1950s.[115]

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[110] *See infra* Part III.A (describing the unusual features of tax rulemaking).

[111] *See* Thorndike, *supra* note 93, at 751–52 (describing complaints of taxpayer oppression and Bureau corruption).

[112] *Id.* at 751 (quoting S. REP. NO. 69-27, at 229 (1926)).

[113] Thorndike explains the dynamic thus:

> Rulings were known only to insiders, including affected taxpayers, their representatives, and relevant BIR employees. As the committee report observed, "This system has created, as a favored class of taxpayers, those who have employed 'tax experts.' It has created a special class of tax practitioners, whose sole stock in trade is a knowledge of the secret methods and practices of the Income Tax Unit." Knowledge of secret precedents had made Bureau employees extremely valuable to corporate taxpayers, fostering a damaging rate of turnover. Only the regular publication of BIR decisions could halt this outflow and ensure equal treatment for all taxpayers.

Id. (footnote omitted) (quoting S. REP. NO. 69-27, at 235 (1926)).

[114] *See id.* at 751–52. Thorndike identifies only one lasting benefit of these inquiries and debates:

Interspersed with this history of the IRS, however, is the history of adjudication of tax controversies. As discussed previously, taxpayers originally had to sue—through an implied common law action against the collector—for a refund of a disputed tax; in other words, there was no analog to the modern Tax Court in which a taxpayer may challenge a deficiency without first paying.[116] Initially, this "pay first, argue later" system was not thought to be unduly burdensome (or perhaps it was thought to be necessary for effective enforcement); however, when tax rates rose in the early twentieth century, demands grew for a pre-collection tribunal.[117]

In response to these concerns, Congress ultimately created within the Bureau of Internal Revenue a Committee on Appeals and Review to hear pre-collection disputes.[118] The public, however, was quick to call for a more independent body.[119] Somewhat predictably, taxpayers perceived a pro-revenue bias from the Committee.[120] Moreover, concerns emerged that powerful, politically-connected taxpayers might receive favors through the agency.[121]

Congress created the independent Board of Tax Appeals in 1924.[122] After some tinkering with the scope of appellate review, Congress largely left the Board alone until the 1940s.[123] In the Revenue Act of 1942, Congress renamed the tribunal the Tax Court of the United States, presumably because the board exercised only

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> In 1926, Congress adopted Couzens's recommendation for a permanent committee to monitor the revenue system, including the BIR. This committee, known as the Joint Committee on Internal Taxation, soon became a leading repository of expertise on federal taxation and a close partner of the Treasury Department in shaping tax policy.

Id. at 752.

[115] *See infra* notes 133–35 and accompanying text.

[116] *See* HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 20–21 (1979) (discussing the history of taxpayer administrative hearings).

[117] *See* Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence When Acting As a Reviewing Court?*, 58 CLEV. ST. L. REV. 603, 617 (2010) (discussing how the rise in tax rates led to the demand for a pre-collection tribunal).

[118] *See* DUBROFF, *supra* note 116, at 39 (describing how the Committee grew out of initial, intentionally temporary review boards).

[119] *Id.* at 43–45.

[120] *Id.* at 41–45.

[121] *See id.* (noting the public's suspicion of large tax refunds made by the Bureau).

[122] Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336, 336–38 (1924).

[123] DUBROFF, *supra* note 116, at 175; Fahey, *supra* note 117, at 631 n.52.

judicial functions.[124] Despite the seemingly minor change, this sparked debate concerning whether the Tax Court was really a court or an agency and which designation would be more misleading.[125] On the one hand, the Board had only judicial functions, but it was still not an Article III court whose judges served with life tenure and salary protection under the Constitution.[126] Moreover, some were concerned that the new nomenclature would be a slippery slope toward Article III status.[127]

For a brief interlude, as a result of *Dobson v. Commissioner*,[128] the Tax Court's findings of fact on appeal were reviewable on a deferential basis as compared to district court findings of fact.[129] The rationale for the *Dobson* decision was simple—the Tax Court was just like any other agency, not a "court" under Article III, and thus entitled to more deference than a district court.[130] This came to an end in 1948 when Congress reorganized appellate review of Tax Court decisions, ending the heightened deference regime.[131] Under the current § 7482(a), Tax Court decisions are reviewable by the United States Courts of Appeals as if they were "decisions of the district courts in civil actions tried without a jury."[132]

Two episodes in tax history finally resulted in major structural reforms to the Bureau of Internal Revenue. First, a series of corruption scandals in the 1950s galvanized support to reform the Bureau.[133] The result was, most importantly, elimination of the office of collector and other political appointees below the level of Commissioner, in an effort to uproot the influence of political connections on collection decisions.[134] Moreover, the Bureau took on the current name Internal Revenue Service; geographic

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[124] Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957.

[125] *See* DUBROFF, *supra* note 116, at 177–81 (describing both sides of the debate regarding the name change generated by the Revenue Act of 1942).

[126] *See* Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957 (dictating that the appointment and tenure of Tax Court judges would be the same as that of Board of Tax Appeals members).

[127] *See* DUBROFF, *supra* note 116, at 179–80 (outlining arguments of individuals opposed to the name change).

[128] 320 U.S. 489 (1943).

[129] *Id.* at 500–01.

[130] *Id.* at 499.

[131] Rules of Decision Act of 1948, ch. 646, § 36, 62 Stat. 991, 991–98.

[132] 26 U.S.C. § 7482(a)(1) (2012).

[133] Thorndike, *supra* note 93, at 755–59.

[134] *Id.* at 760–62.

districts organized by type of tax were abandoned in favor of regional organization by function—collection, audit, appeal, etc.; and the Service added an internal Inspection Service intended to prevent future corruption.[135]

Second, in the late 1990s, renewed complaints of corruption, ineptitude, and heavy handed enforcement tactics ultimately led to reform legislation enacted in 1998.[136] The core reform was to attempt to make the Service more taxpayer-service-oriented.[137] Some of the most important features include procedural safeguards in the collection process (collection due process) and rules for sanctioning and terminating Service employees.[138]

C. SOME PRELIMINARY CONCLUSIONS

With the 1998 reforms, the Service arrived essentially at its current structure. And with this historical background—of both the Service and administrative agencies in general—the unusual structure of the Service today seems more reasonable. Compared to a typical administrative agency, the Service has deeper roots. The origins of review in a common law action against the collector—otherwise there would have been no review—point to why tax adjudication remains to this day split off from the IRS to the courts. But why has Congress failed to update the IRS to the typical agency template?

Although this Article cannot provide a purposive answer to the question, Part IV offers certain policy considerations against Code and APA conformity. It seems especially plausible that perceptions of procedural fairness explain why the tax system has remained different from the standard agency template. Indeed, even as revenue needs grew at times of national distress, Congress did not assign all responsibility for tax administration to an executive agency.[139] The most dramatic tax law changes have

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[135] *Id.* at 762–63.

[136] *See id.* at 774–75 (discussing the development and eventual passage of the Internal Revenue Service Restructuring and Reform Act of 1998).

[137] *See id.* at 775 (discussing the Commission's emphasis on meeting citizens' needs); David J. Herzig, *Justice for All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 1, 30–32 (2013) (outlining the Act's "core concept" of viewing the taxpayer as the client).

[138] *See* Herzig, *supra* note 137, at 30 (providing examples of taxpayer protection provisions).

[139] Thorndike, *supra* note 93, at 736 (discussing a lack of attention paid to the tax system by Congress after World War I).

occurred in response to wartime revenue needs,[140] yet adjudication of controversies remained primarily the province of courts.

Moreover, even if a risk of overreaching by an agency usually is tolerable to achieve the coherency of a unified administration with enforcement, rulemaking, and adjudicative power, the calculus may be different for the tax system. Tax compliance directly involves perhaps the broadest possible array of individuals and businesses in proceedings with an agency that they distrust; accordingly, it may simply be politically unrealistic to bestow the IRS with more adjudicatory power than it currently exercises.[141]

The history of scandal at the Bureau and later the Service should not be taken to prove too much about the overarching structural features of tax administration. Certain historical problems could be ascribed to lack of funding, lack of public guidance, and overpoliticization. Congress has taken steps toward depoliticizing the Service, and, as described in more detail below, to facilitate tax rulemaking.[142] These steps should help to lessen both the revolving door phenomenon and also the potential for corruption. Unfortunately, however, the contemporary Congress shows no sign of correcting the Service's historical underfunding problem.[143]

III. CONTRASTING THE MODALITIES OF FEDERAL TAX ADMINISTRATION WITH THE APA TEMPLATE

The Administrative Procedure Act sets forth a template for how an agency may take action in formulating and implementing policy through rulemaking and adjudication.[144] Although organic enactments for a particular agency can and do vary the procedural requirements and limitations applicable to particular agencies,[145]

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[140] Herzig, *supra* note 137, at 1, 8 (noting the reforms after the Civil War and World War I).

[141] *See supra* Part II.B (describing the public's historical suspicion of the Service and perceptions of corruption).

[142] *See infra* Part III.A.*2*.

[143] *See* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1116 & n.4 (2014) (noting the problems caused by IRS budget cuts).

[144] *See infra* Parts III.A.*1*, III.B.*1*.

[145] *See, e.g.*, Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 506–15 (1995) (classifying statutory limitations on agency discretion, e.g., purposive limits, subject-matter

the APA template serves as a useful comparator for what a true end to tax exceptionalism would resemble. This Part contrasts the modalities of tax administration with the APA template, pointing out that a striking degree of tax exceptionalism exists in terms of the structure of available modalities. Indeed, the degree of exceptionalism arguably overshadows the similarities.

A. RULEMAKING

Under the APA, administrative agencies ordinarily may promulgate rules through a relatively informal process.[146] The required procedure depends on the kind of rule being formulated and the organic enactment (e.g., the Internal Revenue Code).

1. Rulemaking under the APA. Promulgation of legislative rules—rules that have the force and effect of law—requires the enacting agency to undertake notice and comment procedures.[147] These procedures on their face do not sound unduly burdensome: an agency must give the public notice of the proposed rulemaking, solicit comments, and respond to significant comments.[148] Moreover, the rule ordinarily may take effect no sooner than thirty days after publication of the final rule.[149] Again, the effective date provision seems innocuous on its face, but both the procedures and the effective date provision have become significant obstructions to agency policymaking as courts have interpreted and applied them.[150]

Congress most likely intentionally, as a compromise, left the definition of key categories of rules—legislative and interpretative—vague.[151] The doctrine has been unstable over the

limits, procedural prerequisites and limits, limits on standard setting, and limits on regulatory method).

[146] 5 U.S.C. § 553 (2012).

[147] *Id.* Nonlegislative rules (encompassing both interpretative rules and general statements of policy) as well as rules of agency organization and procedure are exempt from these procedures and require no specific procedural formalities. *Id.* § 553(b)(3)(A). There is also an exception for good cause. *Id.* § 553(b)(3)(B).

[148] *Id.* § 553 (setting forth requirements for informal rulemaking).

[149] *Id.* § 553(d). Exceptions are again made for nonlegislative rules and in situations where the agency can show good cause. *See id.* § 553(d)(3).

[150] *See generally* Murphy, *supra* note 4 (detailing the creativity of judges in interpreting the APA and how this has led to increased procedures for agencies to engage in rulemaking).

[151] *See supra* notes 88–91 and accompanying text.

years and remains notoriously difficult to apply to particular controversies.[152] Although there are other candidates, the leading test used in the courts appears to be a pragmatic reading of "interpretative" that looks to whether the rule interprets rather than adds new law, assuming the rule seems fairly binding on the agency or the public.[153] If the rule is too tentative to be binding on the agency or the public, then the rule qualifies as a general statement of policy.[154] These doctrinal distinctions are laudable for adhering to the text of the APA, but arguably do little to identify those rules that should or should not be required to undergo notice and comment procedures.

The arbitrary and capricious limitation is a general limitation on all agency action—rulemaking or adjudication.[155] However, the standard is most typically associated with judicial review of rulemaking.[156] Agencies must make determinations in a rational way, considering relevant factors and applying reasonable judgment.[157] Courts traditionally apply the standard in a highly deferential manner.[158] However, in the words of then-Professor

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[152] *See* Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) ("Distinguishing between a 'legislative' rule . . . and an interpretive rule . . . is often very difficult—and often very important to regulated firms, the public, and the agency.").

[153] *See* Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 679 (6th Cir. 2005); Warder v. Shalala, 149 F.3d 73, 79–80 (1st Cir. 1998); *Hoctor*, 82 F.3d at 167, 171–72; *cf.* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (articulating a four-part test, an important factor of which is "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties"); Murphy, *supra* note 4, at 23 (proposing that courts should be "pragmatic and conservative" rather than "aggressive" in their application of notice-and-comment requirements to Treasury rules); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 548 (2000) (approving of the *American Mining Congress* factors). *But see* Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1015 (9th Cir. 1987) (testing for binding effect on the agency).

[154] *Mada-Luna*, 813 F.2d at 1015.

[155] 5 U.S.C. § 706(2)(A) (2012).

[156] *See* William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394 (2000) (examining whether or not judicial review of informal agency rulemaking under the arbitrary and capricious standard discourages rulemaking).

[157] *Id.* at 397.

[158] *See id.* at 396 (concluding that judicial review in the D.C. Circuit did not significantly impede agencies in the pursuit of their policy goals).

Elena Kagan, courts take a "hard look at whether the agencies themselves have taken a hard look."[159]

Historically, arbitrary and capricious review involved something more akin to minimal rationality review. However, in the landmark *State Farm* case, the Supreme Court shifted toward requiring an agency to explain its reasoning.[160] Although the Court has recently and emphatically signaled that the arbitrary and capricious standard is to be "narrow,"[161] the standard does require an agency to show that it actually had a reasonable rationale at the time for its action.[162] Ideal clarity in the agency's explanation is not required, however, if the connection between the agency's reasoning and action can reasonably be made.[163] The agency must offer in support of its action statutory, technocratic, scientifically-driven, or other non-political reasons.[164] To survive judicial scrutiny, the agency's process must "address all significant issues, take into account all relevant data, consider all feasible alternatives, develop an extensive evidentiary record, and provide a detailed explanation of its conclusions."[165] A court determines the adequacy of the agency's process by examining the entire record for the action under review.[166]

Courts tend to frame arbitrary and capricious analysis in expert and data-driven terms.[167] In response to this regime, scholars

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[159] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001).

[160] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983); Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 550–53 (1986).

[161] FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502, 513 (2009) ("Under what we have called this 'narrow' standard of review, we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.' " (quoting *State Farm*, 463 U.S. at 43)).

[162] *State Farm*, 463 U.S. at 42–43.

[163] *Fox I*, 556 U.S. at 513–14 (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

[164] *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5–6 (2009).

[165] *See* Kagan, *supra* note 159, at 2270.

[166] *State Farm*, 463 U.S. at 44.

[167] *See* Massachusetts v. EPA, 549 U.S. 497, 534 (2007) (holding EPA's decision to deny a rulemaking petition on greenhouse gasses arbitrary and capricious for failure to provide adequate data and scientific grounds for the denial); UAW v. Chao, 361 F.3d 249, 254–56 (3d Cir. 2004) (upholding OSHA's denial of a rulemaking petition after determining that OSHA had adequately surveyed available scientific data); *see also* Wedgewood Vill.

have split on whether to include political rationales as legitimate reasons to justify agency action under the standard.[168] More recent judicial opinions have indicated a willingness to accept political reasoning by agencies.[169]

Accordingly, an agency operating under the APA template is faced with an incentive to undergo relatively burdensome notice and comment rulemaking procedures, or be faced with the prospect of seeing the rule invalidated on procedural grounds.

> According to the ossification hypothesis, the prospect of facing hard look review by the courts has caused administrative agencies to become reluctant to use the informal rulemaking process, with its attendant benefits of clear prior notice, widespread public participation, and comprehensive resolution of issues affecting large numbers of people or economic activities.[170]

Pharmacy v. DEA, 509 F.3d 541, 549 (D.C. Cir. 2007) (drawing heavily from *State Farm*); Morall v. DEA, 412 F.3d 165, 177 (D.C. Cir. 2005) (same).

[168] *See* Kagan, *supra* note 159, at 2380 (proposing that hard look review be relaxed when the President takes an active role in shaping policy); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (arguing that in order to promote transparency, agencies should be required to disclose influences on their decisionmaking and that some political influences may be legitimate considerations); Watts, *supra* note 164, at 32–33 (arguing for an expanded scope of acceptable reasoning under the arbitrary and capricious standard, including political considerations). *But see* Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 574–79 (2010) (arguing that the APA should continue to shield agency rulemaking from the political branches and critiquing Watts's analysis of *Fox I*); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1811–12 (2012) (critiquing political reason giving models because they would undermine the social and organizational structures under which agencies operate).

[169] *See Fox I*, 556 U.S. at 515, 517–18 (upholding under arbitrary and capricious review an FCC indecency sanction, which represented a change in policy, noting the changed political landscape in Congress and that *State Farm* does not require a higher standard of review for policy change); *Chao*, 361 F.3d at 256 (Pollak, J., concurring) (acknowledging the role the change in presidential administrations played in OSHA's denial of a rulemaking petition).

[170] Jordan, *supra* note 156, at 394 (noting but rejecting this consensus); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–91 (2004) ("These requirements may sound minimal, and the Congress that set them forth likely envisioned them to be, but today, promulgating an important legislative rule is a labor-intensive enterprise. Although there are many reasons for this, it is unquestionably due in part to judicially imposed requirements that an agency must follow if it expects to survive a challenge

Moreover, because the effective date generally may not precede the issuance of the final rule under the APA, invalidation on procedural grounds may leave no rule to cover actions taken by regulated parties in the interim, even if the latter have full notice of the agency's intended course of action.[171] The agency might also avoid rulemaking in favor of adjudication, assuming an adequate basis exists in preexisting authority.[172]

2. Tax Rulemaking as Modified by the Code. Tax rulemaking under the Code differs substantially and importantly from the APA template.[173] Section 7805(b) of the Code provides explicit authority for tax rules to take effect retroactively:

> **Retroactivity of regulations.—**
> **(1) In general.**—Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:
> **(A)** The date on which such regulation is filed with the Federal Register.
> **(B)** In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.
> **(C)** The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.
> **(2) Exception for promptly issued regulations.—** Paragraph (1) shall not apply to regulations filed or issued within 18 months of the date of the enactment

to its action in court—requirements that affect an agency even if its rule does not wind up in court.").

171 *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 299 (2003) (noting that courts have sometimes exercised discretion to avoid disruptions when a rule falls to a procedural challenge).

172 *See* Magill, *supra* note 170, at 1396 (discussing an agency's selection of administrative adjudication over legislative rulemaking).

173 *See generally* Puckett, *supra* note 3, at 368–70 (considering hybrid procedures under section 7805(b), distinct from the APA).

> of the statutory provision to which the regulation relates.
> **(3) Prevention of abuse.—**The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse.[174]

Because of this unusual retroactive rulemaking option, the IRS and Treasury arguably do not face the same incentives as a typical agency when considering which administrative modality to utilize to make tax policy.[175] As discussed below, the differential choice of modality analysis stems from the ability of the IRS and Treasury to make rules effective, under ordinary circumstances, as early as the issuance of "any notice substantially describing the expected contents."[176]

Under these rules, invalidation of a tax regulation on procedural grounds could have very different implications for the IRS and Treasury. It would be risky to challenge a tax regulation on procedural grounds, assuming that the regulation may be reissued with retroactive effect, backdated under section 7805(b)(1)(C) to the date when the public had notice of the expected contents. That is not to say there could never be any use to a taxpayer in mounting such a procedural challenge. Issuing a final regulation takes time and resources; thus, a taxpayer could obtain a favorable verdict premised on the invalidity of a regulation, though a regulation reissued before appeal might reverse the outcome for that taxpayer—and would apply to others.

The problems of a rule-free period pending reissuance could be somewhat mitigated if courts remanded to the IRS.[177] If courts remanded as is ordinary in judicial review of agency action,[178] the IRS would have an opportunity to decide the matter without the procedurally invalid rule, and might reissue a valid retroactive rule before litigating in court again. This also would promote equal treatment of similarly situated taxpayers.

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[174] I.R.C. § 7805(b) (2012).

[175] For potential criticism of this analysis, see *infra* notes 189–98 and accompanying text.

[176] I.R.C. § 7805(b)(1)(C).

[177] *See infra* Parts III.B.*3*, IV.A (discussing the failure of courts to remand in tax controversies and the associated consequences).

[178] *See infra* note 249 and accompanying text.

Although current Code section 7805(b) already appears to permit the IRS and Treasury much more rulemaking flexibility than a typical agency enjoys under the APA,[179] it is also possible that *old* section 7805(b)—an even more retroactivity-friendly predecessor—still applies. Prior to amendment, section 7805(b) allowed the Treasury to "prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."[180] The uncodified text of the act provides that the new section 7805(b) applies to "regulations which relate to statutory provisions enacted on or after [July 30, 1996,] the date of the enactment of this Act."[181] A key question is whether the "enacted on or after" phrase modifies "regulations" or "statutory provisions." If the former pairing is correct,[182] then all new regulations would be covered by the new (and less flexible) section 7805(b). If the latter is correct, then only regulations relating to more recent Code sections would be covered by the new section 7805(b).

The IRS has announced its position that only regulations relating to post-1996 Code sections are covered by the new section 7805(b).[183] This is not a mere self-serving position; arguably, it is the reading that is most natural and does not render superfluous the "statutory provisions" language.[184] Although the IRS and Treasury have not issued a regulation to implement that litigating position, such a regulation would possibly be eligible for *Chevron* deference.[185]

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[179] *See infra* notes 284–87 and accompanying text.

[180] I.R.C. § 7805(b)(1) (1994) (amended 1996).

[181] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(b), 110 Stat. 1468, 1469 (1996).

[182] I.e., if the meaning is "regulations enacted on or after July 30, 1996."

[183] Definition of Omission in Gross Income, 75 Fed. Reg. 78,897-01 (Dec. 17, 2010) (to be codified at 26 C.F.R. pt. 301).

[184] Otherwise, would the effective date language be carving out some regulations that do not relate to statutory provisions? This seems like an odd reading indeed, but one that is necessary to conclude that "enacted" relates to "regulations" rather than "statutory provisions." Otherwise, the words "statutory provisions" would appear to carry no weight.

[185] In *City of Arlington v. FCC*, the Supreme Court clarified that there is no special category of jurisdictional questions that are to be carved out of *Chevron* deference. 133 S. Ct. 1863, 1874–75 (2013). Justice Scalia's pithy conclusion is instructive:

> Those who assert that applying *Chevron* to "jurisdictional" interpretations "leaves the fox in charge of the henhouse" overlook the reality that a separate category of "jurisdictional" interpretations does not exist. The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary

Beyond the argument that old section 7805(b) still applies fairly broadly, the IRS and Treasury have tools at their disposal under new section 7805(b). The IRS and Treasury may enact retroactive rules to "prevent abuse."[186] Rules qualifying under this provision could potentially apply to prior tax years, even if the public had no notice from the IRS that it intended to issue a rule.[187] Although this is an area where one would expect deference post-*Mayo*, there is sparse existing case law, and it is mixed in terms of deference to the IRS.[188]

This Article's observations regarding the impact of Code section 7805(b) will likely face criticism. Addressing section 7805(e), Kristin Hickman has argued that a temporary (interim-final) regulation cannot meet the standards of the APA unless it meets an exception to notice and comment, such as the interpretative rules or good cause exceptions.[189] Although Professor Hickman does not, others could attempt to build on her reasoning to argue that section 7805(b)[190] fails to relax any APA requirements.[191]

APA § 559 provides that a "[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that

> and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional." If "the agency's answer is based on a permissible construction of the statute," that is the end of the matter.

Id. (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

186 I.R.C. § 7805(b)(3) (2012).

187 Retroactivity is limited by the Constitution's guarantee of substantive due process, but the standard is very difficult to satisfy absent a reversal of a firmly established rule; clarifying ambiguities retroactively should be permissible. *See* Puckett, *supra* note 3, at 374–83.

188 *See generally* McCormack, *supra* note 3 (surveying cases in the lower federal courts on what constitutes an abuse of discretion in preventing abuse).

189 *See* Brief for Professor Kristin E. Hickman as Amicus Curiae Supporting Respondents, at 14-19, United States v. Home Concrete & Supply LLC, 132 S. Ct. 1836 (2012) (No. 11-139) (arguing that I.R.C. § 7805(e) fails to satisfy the high threshold for recognition as an exception from APA rulemaking).

190 I.R.C. § 7805(b)(l)(C).

191 *Cf.* Hickman, *supra* note 189 (arguing that the APA requirements are fully applicable to Treasury regulations enacted under section 7805(e)).

it does so expressly."[192] Stuart Benjamin and Arti Rai have suggested that specification of a different standard would suffice:

> Such specification both demonstrates that the organic statute is, indeed, intended to supersede the APA and also tells courts what sort of review to apply. A lack of specificity deprives courts of statutory language to guide them in reviewing agency action and thus underscores that the APA still applies.[193]

The difficulty with review of tax guidance is that the Code does not obviously or explicitly supplant the APA rulemaking procedures in their entirety.

Professor Hickman, building on a broad reading of § 559, argues that the good cause exception rarely applies[194] and that tax regulations are not interpretative because the disregard of a regulation risks tax penalties.[195] Hickman acknowledges that there is nothing necessarily inconsistent in a Treasury regulation undergoing notice-and-comment before being backdated to the date of the notice of proposed rulemaking.[196] However, others might attempt to build on Hickman's work to argue that the APA practically nullifies section 7805(b), because the APA does not generally allow backdating of legislative rules. Such an argument seems particularly strained with respect to garden variety notice-

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[192] 5 U.S.C. § 559 (2012).

[193] Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 282–83 (2007).

[194] Hickman, *supra* note 3, at 493–94. As Professor Hickman explains, "courts generally require agencies asserting the good cause exception to do so expressly and contemporaneously, and with specificity and particularity." *Id.* Moreover, "courts tend to be skeptical of generic assertions of a need for immediate guidance . . . [and] generally limit the scope of the exception to truly unusual circumstances, such as when public safety is threatened or advance notice of a rule might undermine its application." *Id.* at 494.

[195] *Id.* at 471 ("Following the Supreme Court's delegation premise, I contend that, at a minimum, statutory penalties for noncompliance with agency rules should serve as a definitive signal that Congress intended those rules to carry the force of law for both the APA and *Chevron* deference.").

[196] *See* Hickman, *supra* note 32, at 1193 ("[I]f Treasury is able to make a Treasury regulation retroactively applicable to the date of the prelitigation NPRM or other notice, then procedural challenges are of little use to the taxpayers who raise them.").

and-comment Treasury regulations.[197] Even with respect to temporary Treasury regulations, one could argue that Congress has acquiesced in Treasury's practice of undertaking post-promulgation comment.[198]

To be clear, this Article does not posit that section 7805(b) supplants all APA rulemaking requirements; rather, courts should carefully harmonize the two schemes in a manner that affords significant effect to such a detailed and facially broad Code provision. Giving significant effect to section 7805(b) seems more likely Congress's intent than for section 7805(b) to apply principally in cases of inconsequential matters or emergencies contemplated by the APA good cause exception (presumably inapplicable to tax).

Yet another impediment exists to taxpayers challenging tax regulations on procedural grounds. Pre-enforcement challenges to regulations under the APA are the norm.[199] However, the Anti-Injunction Act and the Declaratory Judgment Act bar most pre-enforcement challenges to tax regulations.[200] In *Enochs v. Williams Packing & Navigation Co.*,[201] the Supreme Court characterized the purpose of section 7421 as "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund."[202] Moreover, the bar extends beyond collection situations to cases where the remedy would indirectly affect the taxpayer's tax liability.[203] An exception may be available only if there would be irreparable harm to the taxpayer and "under no circumstances could the Government

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[197] *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973) (noting the importance of following Congress's language in the organic enactment without rendering words meaningless).

[198] *See supra* note 14 and accompanying text.

[199] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149–56 (1967), *overruled on other grounds*, Califano v. Sanders, 430 U.S. 99, 105 (1977) (allowing for pre-enforcement review under the APA).

[200] I.R.C. § 7421 (2012); Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2012).

[201] 370 U.S. 1 (1962).

[202] *Id.* at 7.

[203] *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 725 (1974) (holding that a court may not enjoin the Service from revoking a tax exemption that, if granted, would lower a university's tax liability).

ultimately prevail."[204] Meeting these requirements seems virtually impossible, and indeed, the Supreme Court has never found them satisfied.[205]

In sum, before moving on to the subtopic of adjudication, it is appropriate to underscore the substantial implications of the Code's flexibility with respect to rulemaking. The grant of retroactive rulemaking power vitiates one of the main reasons for challenging a rule.

Suppose a party wishes to invalidate a typical non-tax rule. If the court finds the rule procedurally deficient, the agency cannot apply the rule until after it has undergone notice and comment again. And it cannot apply the rule retrospectively, even though regulated parties had notice of the agency's intentions.[206] Taxpayers, however, would not seem to have much to gain by invalidating a regulation on procedural grounds, if the IRS may simply reissue it and apply it retroactively (either under section 7805(b)(1) or to prevent abuse under section 7805(b)(3)).[207]

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[204] *Williams Packing*, 370 U.S. at 7.

[205] *See* Hickman, *supra* note 32, at 1170–71 (suggesting that the Supreme Court's failure to apply the *Williams Packing* exception is "perhaps unsurprising," given the exacting requirements). In *Cohen v. United States*, the D.C. Circuit allowed an APA challenge to a telephone excise tax refund procedure promulgated in a notice issued without notice and comment. 650 F.3d 717, 736 (D.C. Cir. 2011). The opinion in *Cohen* seems practically confined to the issuance of refund procedures. In distinguishing *Williams Packing*, the court acknowledged:

> [T]his suit is *sui generis*. Allowing Appellants to proceed without first filing a refund claim will not open the courthouse door to those wishing to avoid administrative exhaustion procedures in other cases. In the tax context, the only APA suits subject to review would be those cases pertaining to final agency action unrelated to tax assessment and collection. More broadly, litigants could not avoid exhaustion when challenging agency decisionmaking, because *McCarthy* and its progeny apply only when litigants challenge the exhaustion scheme itself. And once litigated, precedent would preclude later litigants challenging exhaustion procedures from relying on *McCarthy* in a court that had previously rejected the same argument.

Id. at 733.

[206] *See supra* note 171 and accompanying text. *Cf.* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317–20 (2012) (holding that a retroactive reversal of the FCC's guidelines concerning fleeting expletives violated due process on account of vagueness and failure to give fair notice to regulated parties).

[207] *See* Hickman, *supra* note 32, at 1193–94 ("If a reviewing court is likely to conclude that Treasury's pursuit of notice and comment in finalizing regulations cures the procedural flaws of the preceding temporary ones, then taxpayers gain nothing from raising procedural challenges against Treasury's earlier procedural failures. Likewise, if Treasury is able to

3. Judicial Review of Legal Conclusions in Rulemaking. Assuming that an agency's rules survive procedural review, a court may need to further consider whether to respect the agency's conclusions in such guidance. Courts generally defer, *to some extent*, to the positions of an agency vested with authority to implement the relevant statute.[208] Deference regimes to some extent respect separation of powers and comparative institutional advantage at policymaking.[209] If *Chevron* applies, there is little more for a reviewing court to do, because *Chevron* essentially is a subset of arbitrary and capricious review.[210] However, if the less deferential *Skidmore* framework applies, the position of an agency is entitled to deference to the extent the position is persuasive, taking into account such factors as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[211] Which of these frameworks applies can sometimes be an exercise in guesswork.[212]

Although *Mayo* clarified that notice and comment Treasury regulations qualify for *Chevron* deference,[213] many unsettled questions remain in the area of judicial review of tax guidance. For example, do temporary Treasury regulations qualify for *Chevron* deference? Are they void *ab initio*? Similar questions arise with respect to subregulatory guidance, such as IRS Revenue Rulings and IRS Notices. As discussed above, Professor Hickman has suggested that Treasury regulations or even subregulatory

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make a Treasury regulation retroactively applicable to the date of the prelitigation NPRM or other notice, then procedural challenges are of little use to the taxpayers who raise them.").

[208] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–34 (2001) (describing *Chevron*'s expansion of judicial deference to agencies).

[209] *See* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 124–25, 139–49 (1994) (comparing the advantages of agencies versus courts); *cf.* Merrill & Hickman, *supra* note 208, at 865–66 (discussing the idea that deference is a second-best solution to the nondelegation doctrine).

[210] *See* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (stating "our analysis would be the same" under *Chevron* step two and APA arbitrary and capricious review).

[211] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[212] *See* Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1352 (2013) (likening to a lottery administrative agencies' menu of procedural choices and the linkage to muddled deference doctrines).

[213] *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011).

rules promulgated without notice and comment are, because of applicable penalty provisions, vulnerable to procedural challenge, though taxpayers may have little interest in overturning regulations that address "minor housekeeping matters."[214]

Another potential approach would be for courts to defer under *Skidmore* prior to tax guidance undergoing notice and comment. The underlying assumption would be that rules can be interpretative despite the existence of penalty provisions.[215] If, on the other hand, a rule is legislative and no exemption from APA notice and comment applies, rather than invalidating the rule, courts could remand the relevant matter to the IRS and Treasury for further consideration.

Even given the IRS and Treasury's retroactive rulemaking power, it would be disruptive if courts invalidated most tax guidance issued without notice and comment.[216] The IRS and Treasury might not choose to take the time to reissue every particular rule that the courts invalidate; they might simply turn to enforcement by litigation rather than giving general guidance. In addition, given the impetus from a court to redo a rulemaking, the IRS and Treasury may modify the rules, upsetting expectations at the margins.

B. ADJUDICATION

Rulemaking is not a practical way to address every matter conceivably before an agency. Sometimes agencies do not discover policy problems before they are presented with a concrete factual situation. Moreover, given the intensiveness of judicial review of rulemaking, agencies may conclude that it is better to forego rulemaking and make policy through adjudication.[217] As discussed below, the choice between rulemaking and adjudication generally

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[214] *See* Hickman, *supra* note 3, at 471–72; *see also supra* notes 189–98 and accompanying text.

[215] *See* Puckett, *supra* note 3, at 367–74 (arguing that *Skidmore* deference is appropriate if there has not been an opportunity for meaningful public participation).

[216] *See* Hickman, *supra* note 3, at 530–31 ("Categorically invalidating and remanding Treasury regulations with temporary origins would upset taxpayers' settled expectations and could seem more arbitrary and capricious than leaving the regulations in place notwithstanding their procedural flaws.").

[217] *See supra* note 172 and accompanying text (discussing how agencies may choose adjudication over rulemaking outside the tax context).

is flexible.[218] Somewhat different—though still deferential—standards govern judicial review of a typical administrative agency's formal adjudication.[219] Tax adjudication, however, is special because it is largely informal at the IRS level;[220] accordingly, the IRS is unable to maintain control over adjudication in the manner that a more typical agency may use to accomplish its regulatory goals.

1. Adjudication under the APA. In the landmark *Chenery II* decision, after acknowledging that prospective rulemaking would generally be optimal, the Supreme Court afforded agencies wide discretion to make policy through retrospective adjudication:

> [A]ny rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[221]

The word "adjudication" may conjure an image of a trial-like proceeding. However, for APA purposes, adjudication can also be a catch-all category for the residual of agency action that is not rulemaking.[222] This does include trial-like proceedings,[223] but also includes informal determinations such as whether a letter bears

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[218] *See infra* notes 221–32 and accompanying text.

[219] *See infra* notes 233–40 and accompanying text.

[220] *See infra* notes 243–49 and accompanying text.

[221] SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947).

[222] 5 U.S.C. §§ 554–555 (2012).

[223] *See* Michael Ray, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 382 (2009) (discussing the formal proceedings required in §§ 556–557).

the correct postage. If the organic statute requires a hearing *on the record*, trial-type procedures are triggered.[224] However, an agency may choose to provide a more formal process even if it is not required to abide by the on-the-record hearing requirements of the APA.[225]

Agency adjudication has long been a staple method for administrative agencies affecting important rights of regulated parties.[226] But it has, at the same time, been controversial in some quarters. The declaration of a principle and simultaneous application of it to the party in an adjudication provides little notice to regulated parties.[227] Moreover, a classical conception of separation of powers would be offended by the vesting of quasi-judicial functions in the same body that makes rules and prosecutes violations of those rules.[228]

Nevertheless, the Supreme Court in the landmark *Chenery II* case upheld the discretion of agencies to choose to make policy through adjudication rather than rulemaking.[229] In *NLRB v. Bell*

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[224] 5 U.S.C. § 554(a). The Supreme Court has not yet definitively ruled on whether a hearing requirement in the context of adjudication triggers formal adjudication, but has held that a mere hearing requirement does not require formal procedures in the context of a rulemaking. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973) (noting that a "hearing" requirement, without more, does not trigger formal procedures in the context of a rulemaking). The lower federal courts (except for the U.S. Court of Appeals for the Ninth Circuit) have generally tracked *Florida East Coast Railway*, even in the context of adjudication, looking for a requirement that the hearing be "on the record" to trigger formal adjudication procedures. *See* Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989) ("We will henceforth make no presumption that a statutory 'hearing' requirement does or does not compel the agency to undertake a formal 'hearing on the record,' thereby leaving it to the agency, as an initial matter, to resolve the ambiguity."). *But see* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1264 (9th Cir. 1977) ("In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections.").

[225] Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) ("[A]gencies are free to grant additional procedural rights . . . .").

[226] In fact, *Chenery II* itself dealt with an SEC adjudication that imposed novel restraints on a corporation. *Chenery II*, 332 U.S. at 201–09.

[227] *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 930 (2004) (quoting Judge Williams describing agency adjudication as "ad hocery . . . that affords less notice . . . to affected parties" than informal rulemaking (quoting Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111–12 (D.C. Cir. 1993))).

[228] *See supra* notes 41–42 and accompanying text.

[229] *Chenery II*, 332 U.S. at 203 (stating that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency").

Aerospace Co., the Court reaffirmed this principle of agency discretion, permitting the NLRB to reverse policy through an adjudication.[230] However, dicta suggests that an agency may not impose an obligation retroactively where a party will suffer "substantial" harm for actions taken in "good-faith reliance" on prior guidance.[231] The scholarly consensus is that such disallowance should be rare and unusual.[232]

2. Judicial Review of Findings of Fact and Legal Conclusions. Courts review agency findings of *fact* in adjudicatory proceedings under the "substantial evidence" test.[233] For *legal* conclusions, the same principles of judicial review applicable to legal conclusions in rulemaking apply.[234] As discussed above, legal conclusions may receive either *Chevron* deference (the agency's conclusion stands if it is not arbitrary and capricious) or *Skidmore* deference (the agency's conclusion receives deference to the extent of its power to persuade based on all the facts and circumstances).[235] In *United States v. Mead Corp.*, the Supreme Court held that *Chevron*

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[230] 416 U.S. 267, 292–94 (1974).

[231] *Id.* at 295; *see also* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 & n.12 (1984) (refusing to adopt a "flat rule that estoppel may not in any circumstances run against the Government" and noting that "this principle also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests" (citing *Bell Aerospace*, 416 U.S. at 295; Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807–08 (1973) (plurality opinion); *Chenery II*, 332 U.S. at 203)).

[232] Pierce summarizes the state of the law as follows:

> The Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication in any opinion since *Bell Aerospace*. Nor has it suggested any content that might be given its vague reference to "abuse of discretion" as a potential basis for reversing an agency's decision to rely on adjudication as a means of announcing a "rule." Thus, [the court decisions on the subject] must be taken as a flat rejection of any judicial attempt to constrain agencies from developing "rules" through the adjudicatory process.

1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.9 (5th ed. 2010); *cf.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 523–24 (1978) (holding that the APA provides ceiling and floor procedural requirements for rulemaking unless Congress otherwise provides).

[233] 5 U.S.C. § 706(2)(E) (2012).

[234] *Id.* § 706(2)(A); *see also supra* Part III.A.*3* (describing judicial review of legal conclusions in rulemaking).

[235] *See supra* notes 210–12 and accompanying text.

generally applies to legal conclusions arrived at through formal—but generally not informal—adjudication.[236]

The arbitrary and capricious standard[237] is a useful comparator for thinking about the meaning of "substantial evidence." Some administrative law scholars have concluded that there is no difference, in practice, between the two standards.[238] As Magill explains,

> [S]ome members of Congress viewed the scope-of-review provisions as a response to insufficiently rigorous judicial review of agency factfinding . . . that courts had upheld agency factual determinations if there was *any* evidence (even a "mere scintilla") in the record supporting the agency's conclusions, without regard to the evidence in the record that contradicted or cast doubt on the supporting evidence.[239]

In *Consolidated Edison Co. v. NLRB*, the Supreme Court defined the standard as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[240]

3. De Novo Review of Tax Deficiency Determinations. The adjudication of tax controversies is, like tax rulemaking, very specialized. The system relies, at the first level, on individual taxpayers voluntarily assessing their tax liability and filing a return if their income exceeds the filing threshold.[241] At the first stage, each taxpayer has the responsibility of organizing their records and taking the first shot at determining their income. The IRS reviews the return and compares it against matching data it has received from other sources, may request additional

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[236] *See* United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (observing that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force," and that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication").

[237] *See supra* Part III.A.*1*.

[238] *See* Magill, *supra* note 170, at 1428–30 (describing the malleability of both standards in practice).

[239] *Id.* at 1428–29.

[240] 305 U.S. 197, 229 (1938).

[241] *See* I.R.C. §§ 6011–6012 (2012).

information, or may conduct an audit of a randomly selected taxpayer.[242] If the IRS disagrees with the taxpayer's conclusion as to how much tax is due, it must give the taxpayer notice before technically assessing and collecting the deficiency.[243] The statutory notice provides the taxpayer an opportunity to protest the deficiency in Tax Court without first paying the tax due.[244] However, if the taxpayer pays the full amount of tax due, the taxpayer has the option of suing in district court or the Court of Federal Claims for a refund.[245]

In tax deficiency litigation, facts are adjudicated de novo[246] in the Tax Court as well as in refund courts.[247] The court will also rule on legal issues, potentially applying a deference doctrine, and enter a judgment without remanding to the IRS.[248] This is also distinct from general administrative agency practice, where remand is the normal remedy if the agency has not adequately explained its decision when it initially considers the matter at hand.[249]

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[242] *See id.* §§ 6201–6203 (assessment of tax liability); *cf.* Kenneth H. Ryesky, *Taxation Unchecked and Unbalance: The Supreme Court's Denial of Certiorari in* Sorrentino, 41 GONZ. L. REV. 505, 524 (2006) (discussing the privacy implications of the IRS's information gathering enforcement methods).

[243] I.R.C. § 6212 (2012).

[244] *Id.* § 6213(a).

[245] *Id.* § 7422; Flora v. United States, 362 U.S. 145, 163 (1960) (discussing the two types of tribunals available for taxpayers, dependent on pre-payment or post-payment of the assessment due).

[246] Stephanie Hoffer and Chris Walker examine adjudication by the Tax Court and argue for application of the ordinary remand rule; however, their argument primarily applies to limited groups of cases: innocent spouse determinations, collection due process matters, or other instances where the trial de novo provisions do not apply. *See* Stephanie R. Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 267–68 (2014).

[247] *See* Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 438–39 (2008) (discussing the level of discretion employed by the Tax Court).

[248] *See* I.R.C. §§ 6214–6215 (giving the Tax Court jurisdiction to determine deficiencies; *Id.* § 7482(c)(1) (giving the United States Courts of Appeals the power to affirm, modify, or reverse the decision of the Tax Court, "with or without remanding the case for rehearing").

[249] *See* 3 PIERCE, *supra* note 232, § 18.1. In the landmark *Chenery I* decision, the Supreme Court reaffirmed the principle that agency action normally is set aside until the agency can articulate a justifiable explanation for its action:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with

IV. INTERROGATING STRUCTURAL TAX EXCEPTIONALISM

Having surveyed the structural differences between tax administration and the agency template under the APA,[250] it appears that *Mayo*'s end to tax exceptionalism is really more of a change in nomenclature than a paradigm shift. Beyond the legalistic conclusion that tax exceptionalism is not truly dead, the question remains whether structural tax exceptionalism is more than just historical accident. Accordingly, this Part interrogates structural tax exceptionalism across three important policy criteria: effective use of agency expertise, procedural fairness, and incentives to choose rulemaking versus adjudication. These observations are necessarily preliminary and lay a foundation for future work in this area.

A. EXPERTISE

One of the primary goals of delegating the implementation of statutory schemes to agencies is to have an impartial, expert decisionmaker develop more specific, coherent policies.[251] Thus, one of the first questions to ask about structural tax exceptionalism is whether it bears a high cost in terms of foregone benefits of agency expertise.

As this Article has argued, tax rulemaking is generally far more flexible than the APA template, granting the IRS and Treasury wide latitude to implement policy by rule.[252] Although structural tax exceptionalism surely facilitates the rulemaking modality, one could question whether tax adjudication facilitates the use of agency expertise as well.[253] Two key departures from the APA adjudication template stand in the way of agency expertise. The IRS is not able to develop a record, find the facts, and confine

> artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

SEC v. Chenery Corp., 318 U.S. 80, 95 (1943).

[250] *See supra* Part III.

[251] *See* Datla & Revesz, *supra* note 23, at 777.

[252] *See supra* Part III.A.*2*.

[253] *See* Hoffer & Walker, *supra* note 246, at 273–76.

judicial review to a record that has already been developed.[254] Moreover, a reviewing court generally will not remand a case to the IRS for further consideration in a tax controversy.[255]

It is debatable whether the fact finding function in isolation makes a significant difference in terms of expertise. Indeed, it is conceivable that courts are superior to the IRS at looking at extremely varied factual settings and evaluating credibility. Theoretically, even mixed questions can be separated into questions of fact and law, though the distinction can be quite elusive.[256] Provided that the IRS receives appropriate deference on the legal elements in a mixed question, the fact that a court finds facts is not so troubling. That last proviso, however, soon turns out to be a weak spot in tax administration.

The lack of formal adjudicatory power of the IRS goes beyond just factfinding. Under the Supreme Court's framework in *Mead*, the IRS will *not* receive *Chevron* deference on its legal conclusions, absent a prior tax rule to apply.[257] Accordingly, the application of tax expertise is hampered compared to the APA baseline. In contrast, the SEC may, if it prefers, formulate and at the same time apply broad standards to a regulated party in a formal adjudication. It would, in turn, receive *Chevron* deference on its legal conclusions.[258] *Chevron* had not been decided at the time of the Supreme Court's landmark *Chenery II* decision; however, the SEC's announcement of a new standard in a formal adjudication[259] now would receive *Chevron* deference under *Mead*.[260] But the informal process of the IRS sending a notice of deficiency is undoubtedly too informal to generate deference under the

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[254] *See supra* Part III.B.*3* (noting courts' de novo review of facts in tax controversies).

[255] *See* Hoffer & Walker, *supra* note 246, at 273–76

[256] *See* Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1867–72 & n.168 (2014).

[257] *See* United States v. Mead Corp., 533 U.S. 218, 229–33 (2001) (refusing to apply *Chevron* deference to agency determinations that are "far removed . . . from notice-and-comment rulemaking"). If the IRS is interpreting a preexisting agency rule or regulation (an agency authority—*not* just the Code), a *Chevron*-like doctrine variously known as *Auer* or *Seminole Rock* suggests that the IRS's interpretation would control unless "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

[258] *See supra* note 236 and accompanying text.

[259] *See supra* note 221 and accompanying text.

[260] *See supra* note 236.

apparent *Mead* safe harbors,[261] nor does a notice of deficiency seem like the kind of agency process that Congress would have expected to receive deference (the more general thesis of *Mead*).[262]

Moreover, even outside of situations where deference doctrines truly make a difference, it is conceivable that the failure of courts to remand to the IRS in tax litigation promotes dysfunctional agency behavior and hampers reasoned decisionmaking. With respect to the latter, it may be overly optimistic to expect coherent decisionmaking from the IRS given that the IRS does not really know what the facts are before it litigates in court. Because parties can introduce new evidence at trial, and all findings of fact are subject to de novo review by the court,[263] applying the law to the facts at the IRS level is something of a guessing game. This is very much unlike the APA template where the court's review is strictly limited to the record adduced at the agency level,[264] and the agency's fact findings should be respected if supported by substantial evidence.[265] Making the IRS just another litigant in controversies rather than reserving for it a more quasi-judicial role probably tends to promote exaggerated, litigation-oriented argumentation that is unhelpful to taxpayers as guidance of general applicability. If matters were remanded to the IRS when a reviewing court is unsatisfied with the agency's explanation, it would give the IRS a better chance to formulate durable and general principles of tax law and policy.

Remands, of course, have potential drawbacks. They are potentially costly in terms of agency and court resources. Moreover, in the tax context, interest is accruing, and the taxpayer

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[261] *See Mead*, 533 U.S. at 229–31 (describing the situations where *Chevron* deference is appropriate).

[262] *See id.* at 229–34 (describing the situation in *Mead* that did not warrant *Chevron* deference).

[263] *See* Johnson, *supra* note 4, at 1822–23 (2014) (noting that review of facts is de novo, and arguing that the Tax Court is a "reviewing" court even though it considers evidence not considered by the agency).

[264] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (holding that the record for review of adjudication was the record before the agency at the time of its decision and not a new record created on judicial review of the agency's action); *cf.* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 248–50, 253 (2d Cir. 1977) (invalidating FDA rules for processing fish because the notice of proposed rulemaking failed to include significant data upon which the FDA relied and noting that de novo evidence was properly excluded by the district court).

[265] *See supra* note 233 and accompanying text.

may be prejudiced by delay. Finally, not all tax controversies feature issues that would truly benefit substantially from a remand.[266] On balance, however, it seems premature to conclude that remands could never be optimal particularly if the forum is the Tax Court, where the taxpayer is less likely to suffer from acute liquidity issues.

B. PROCEDURAL FAIRNESS AND TAXPAYER MORALE

It is often said that our tax system depends critically on voluntary compliance.[267] Accordingly, it is important that taxpayers respect the system; otherwise, they may cheat more and, indirectly, cause everyone else to pay more. Nancy Welsh comments that

> Although issues of procedural justice often do not attract as much public attention as concerns about distributive justice, research has shown that when people experience dispute resolution and decision-making procedures, they "pay a great deal of attention to the way things are done [i.e., how decisions are

[266] *See* Hickman, *supra* note 32, at 1196. Hickman has questioned the potential benefits of a remand. "Theoretically, the court could also remand the taxpayer's individual case to the IRS for further adjudication in light of its invalidation of the underlying regulation, but to what end?" *Id.*

[267] *See, e.g.*, Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 5–6 (2004). Professor Camp cogently observes that:

> Like many clichés, however, "voluntary self-assessment" is true in a more significant sense than it is false. The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe—through withholding or otherwise—without overt government compulsion. It is "voluntary" in the same sense that stopping one's car at a red light—at midnight with no traffic and no one looking—is voluntary. It is each citizen's self-enforcement of the legal duty that keeps both the tax and transportation systems running smoothly. With over 130 million individual returns and over 80 million other returns (not including information returns) filed in calendar year 2001, the system depends on the veracity, if not the kindness, of taxpayers.

Id. (footnote omitted).

> made] and the nuances of their treatment by others."[268]

Moreover, perceptions of procedural justice often have a strong effect on perceptions of distributional fairness (and much stronger than the reverse effect).[269]

Design of tax adjudication should heed these teachings. Studies have shown a strong preference for a traditional adversarial trial rather than an inquisitorial process in which the same party investigates and decides.[270] Moreover, given the pervasive mistrust of the IRS, one should especially hesitate to consider combining formal adjudication under the umbrella of the IRS rather than vesting such power primarily in the courts. Differentiating tax adjudication, which involves not only repeat players with large claims but also individuals and small businesses, has some basis in empirical work showing that institutional litigants care little about procedural fairness and focus only on the outcome.[271]

The Code's vesting of formal adjudication primarily with the courts, rather than with the IRS (as the APA template would otherwise provide), appears to have important benefits for taxpayer perceptions of fairness.[272] All other things being equal, perceptions that the system is fair should increase willingness to

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[268] Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 817–18 (2001) (quoting E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 242 (1988)); *see also* Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 5–6 (2009) (noting the significance of procedural justice for institutional legitimacy and voluntary compliance); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 435–39 (1992) (discussing the psychological impact of judicial procedures); William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 56–59 (2014) (advocating a definition of judicial productivity that incorporates measures of accuracy and procedural fairness).

[269] Welsh, *supra* note 268, at 818–19.

[270] *See* Burch, *supra* note 268, at 29 (citing JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 104 (1975)).

[271] *See* Welsh, *supra* note 268, at 818 nn.148–49 (citing studies that suggest a distinction between individual and institutional litigants).

[272] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–20, 22, 59–62, 147–50, 162–63, 178, 234–35 (1990) (emphasizing the importance of the law's consistency with prevailing norms of justice within a particular community and noting specifically that the low non-compliance with income tax is explainable from a normative, but not instrumentalist, perspective).

pay or decrease willingness to cheat. One countervailing feature is the Code's grant of retroactive rulemaking authority to the IRS and Treasury. To the extent that this seems quasi-adjudicatory, it could also seem unfair that the IRS and Treasury are able to issue such guidance. However, retroactive application of rules can be a powerful tool to (1) prevent abuse or (2) apply the same rules to similarly situated taxpayers with tax years still open under the statute of limitations on assessment. On balance, these latter features should promote perceptions of fairness, assuming the rule is a clarification rather than unexpected change.

The principal cost of vesting formal adjudication with the courts is the tendency of courts to reach disparate outcomes on similar facts.[273] This bears at least two kinds of costs. First, complexity makes tax planning more difficult and expensive. Second, applying different rules to similarly situated taxpayers can lead to perceptions of unfairness.

On the other hand, a defense of decentralized decisionmaking can be made. Ronald Krotoszynski, in assessing whether the judicial power of the United States should be more centralized, makes a persuasive defense of our current (decentralized) system of judicial circuits:

> By making the decisional process on important, but difficult, questions of constitutional law a collective endeavor, placed in entirely separate hands, operating largely independently of each other, the risk of insufficiently considered—reasoned—decision making is substantially reduced (as are some of the risks of collective, collegial decision making, such as so-called "group think"). When disparate and independent courts ask and answer the same question and render

[273] *See, e.g.*, Bryna Lee Rosen, Note, *The Home Office Deduction Game: Will* Soliman v. Commissioner *Return the Taxpayer to Square One?*, 12 VA. TAX REV. 141, 148 (1992) (describing a situation where Tax Court adjudication became so disparate that Congress intervened).

> the same answer, the legitimacy of that answer is greatly enhanced.[274]

One of the key benefits of decentralized judicial decisionmaking is capture avoidance.[275] "By decentralizing the federal courts and creating separate juridical entities that operate more or less entirely independently of each other, Congress has greatly reduced the risk of agency capture with respect to the federal courts."[276]

Independent from the anti-capture protection of the courts, Krotoszynski argues that decentralized decisionmaking helps avoid cognitive bias or dysfunction, such as "groupthink."[277] Groupthink is most likely a problem for a cohesive, insulated group.[278] As a threshold matter, the IRS and Treasury may simply not be the kind of institutions that are likely to be prone to groupthink, given the number of employees and their different backgrounds. However, it is possible that certain subgroups in the agency could be at risk. Symptoms of groupthink vary, but notably include taking extreme positions and overconfidence, especially in the morality of the group as opposed to outsiders.[279] Another dysfunctional group dynamic is social loafing, or diminished individual effort toward group products, in part because obtaining credit for one's contribution may be difficult or impossible.[280]

Although more immediate simplicity and consistency can be attractive, the legitimacy benefits of hundreds of different judges, from different political backgrounds, considering tax matters is also attractive. On the other hand, because the IRS and Treasury have the power to promulgate very specific rules and even retroactive rules, they have some discretion to effectively opt out of

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[274] Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1027 (2014) (footnote omitted).

[275] *Id.* at 1050.

[276] *Id.*

[277] *Id.* at 1066 ("Although the available evidence is mixed, in general creating a plethora of diverse and independent decision makers should improve the quality of the decisional process and, by implication, the quality of the decisions themselves.").

[278] *Id.*

[279] *Id.* at 1067.

[280] *Id.* at 1071.

adjudication on certain issues, if they are willing to undertake the procedures required for the rulemaking process.

C. CHOICE OF POLICYMAKING MODALITY

As is perhaps evident from the Supreme Court's decades-old dicta in *Chenery II*, most commentators would prefer, all other things being equal, that agencies make policy through prospective rules to the extent reasonably feasible.[281] However, as Elizabeth Magill aptly has stated,

> Each form should be thought of as a package with specific features—the procedure the agency must follow; whether and how the agency's action binds private parties; whether and when the agency's action can be challenged in court; and the standard that a court will apply when that suit is brought.[282]

Accordingly, an agency cannot necessarily be expected to utilize rulemaking rather than adjudication, even if it has notice of a potential issue about which the public would benefit from guidance.[283]

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[281] *See supra* note 221 and accompanying text; Magill, *supra* note 170, at 1396 ("A common lament is that agency reliance on administrative adjudication in the enforcement context is unfair because it permits the agency to pick a sympathetic target and to present its view in a friendly forum (depending on the agency), and may mean that a newly minted legal obligation will be imposed retroactively on a single target.").

[282] Magill, *supra* note 170, at 1396.

[283] Mark Grunewald has explained why the NLRB failed to engage in rulemaking for approximately fifty years, despite "[d]ecades of critical commentary, frequent prodding from reviewing courts, and legislative proposals for mandatory rulemaking." Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 (1991) (footnotes omitted). When the NLRB turned to considering whether rulemaking would be desirable, the meeting was contentious, considering such factors as

> (1) whether rulemaking would stimulate the submission of useful empirical data or would simply attract the same generalized legal/policy arguments heard in adjudications; (2) whether the data that might be submitted would provide as reliable a basis for policymaking as the evidence that is admitted and tested through cross-examination in adjudications; (3) whether loss of the assumed sensitivity of case-by-case consideration would be offset by the assumed speed and efficiency of a generalized approach; (4) whether the process of proposing and possibly modifying proposed rules calls into question or enhances the concept of Board expertise; (5) whether the Board's regulated constituencies would find rulemaking credible and

As discussed in Part III, a typical agency may bind through a formal adjudication and receive a strong degree of deference on both findings of fact and legal conclusions. With two of the factors (bindingness and deference) being roughly equal, for a typical agency, the remaining key consideration is whether the procedures for formal adjudication are less demanding than those of informal rulemaking. And indeed, there is a sense that "hard look" review for rulemaking has rendered rulemaking very burdensome.[284] Accordingly, agencies often may have an incentive to avoid rulemaking and instead announce new policies through adjudication.

Because of the unusual features of tax rulemaking and adjudication, the incentives are reversed. Tax rulemaking is generally more flexible and less likely to be challenged on procedural grounds in any event because the Anti-Injunction Act and Declaratory Judgment Act almost always postpone challenges to regulations until after enforcement.[285] Meanwhile, adjudication is not as tempting an alternative to rulemaking, because tax adjudication at the agency level does not follow APA formal adjudication procedures.[286] Facing de novo review at the reviewing court, the IRS could attempt to narrow the issues by rulemaking.

In this instance, structural tax exceptionalism appears to carry a benefit in that it promotes rulemaking over adjudication. That incentive is generally beneficial because rulemaking provides guidance and allows effective planning. However, for those who value the public participation element of rulemaking, the current system arguably comes up short because comments often may follow promulgation of a rule.[287] On balance, however, post-

> participate; and (6) whether the Board could continue to adjust policy through adjudication having undertaken rulemaking.

Id. at 293.

[284] *See* Manning, *supra* note 227, at 914 n.117 (noting that the doctrine has "greatly increased the cost of notice-and-comment rulemaking by intensifying the agencies' obligation to release material data as part of the relevant notice, to create a rulemaking 'record' for judicial review, and to respond to important issues raised during the comment period").

[285] *See supra* Part III.A.*2*.

[286] *See supra* Part III.B.*2*.

[287] *Cf.* Hickman, *supra* note 3, at 519–20 ("Much like the legislative process, the APA's notice and comment requirements provide the agency with 'the facts and information

promulgation consideration of comments may be a reasonable price to pay for increased prospective guidance.

V. CONCLUSION

This Article has interrogated the prevailing wisdom that tax exceptionalism is dead, a common refrain that the Supreme Court's decision in *Mayo*[288] has sparked. Undertaking a comparative historical and structural analysis of tax administration side by side with typical agency administration, one important contribution of this Article is to clarify that applying *Mayo*'s mandate to apply a "uniform"[289] approach carries a very thin, residual effect. That is because the structure of tax administration—in terms of rulemaking and adjudication—is so exceptional.

Beyond the legalistic conclusion that neither reviewing courts nor the IRS and Treasury can truly escape tax exceptionalism, this Article has identified important historical and current policy justifications for the persistence of structural tax exceptionalism. Moreover, it shows how the unusual features of tax rulemaking and adjudication articulate with one another in a reasonably coherent, though extremely complicated, manner. Although there may be benefits to reshaping the structure of tax administration to be less exceptional (i.e., more like most other federal administrative agencies), there are also likely to be complicated advantages and disadvantages to such a shift.

The benefits of assimilation to the APA template could include more consistent and fairer outcomes and enhanced use of the expertise of the IRS and Treasury. However, the tax system may, for pragmatic cultural reasons, require more judicial control over tax controversies and more flexibility with respect to the issuance of guidance than a typical federal administrative agency. Assimilation to the APA template could potentially mean less guidance through rulemaking, more case by case adjudication,

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relevant to a particular administrative problem, as well as suggestions for alternative solutions,' and 'reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.' " (footnotes omitted) (quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987))).

[288] Mayo Found. for Educ. & Research v. United States, 562 U.S. 44 (2011).

[289] *Id.* at 713 (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

lower taxpayer morale, and lower voluntary tax compliance. Accordingly, this Article urges caution before ending structural tax exceptionalism in a quest for more uniform administrative law. Uniformity is an important value, to be sure, but it is not the only relevant consideration at stake.